No. 88-1992

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In the Supreme Court of the United States

OCTOBER TERM, 1988

ALCOLAC, INC.,
Petitioner,

vs.

BETTY ELAM, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

Respondents are dissatisfied with Petitioner's statement of the questions presented for review. In accordance with Supreme Court Rule 34.2, Respondents state the following questions which were omitted by Petitioner, and which must be decided before Petitioner's questions:

1. Should the petition for a writ of certiorari be denied for want of a final judgment as called for by Title 28 U.S.C. Section 1257.

2. Is this a proper case for review where the retrial ordered by the Missouri Court of Appeals may be governed by new and different punitive damage legislation.

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JURISDICTION

Respondents are dissatisfied with petitioner's statement of the grounds on which the jurisdiction of this Court is invoked. Specifically, respondents state that there is no "final judgment" as defined by 28 U.S.C. Section 1257, in that the decision of the Missouri Court of Appeals has ordered further proceedings on remand, to-wit: a retrial on the issue of the amount of actual and punitive damages. As these cases are presently postured, no dollar amount of punitive damages has been finally determined or assessed.

STATEMENT OF CASE

Respondents are dissatisfied with petitioner's statement because it presents a grossly distorted picture of the case through extensive misstatements and omissions of fact. Pursuant to Supreme Court Rule 34.2, a correct statement follows:

Petitioner, Alcolac, Inc., is a manufacturer of toxic chemicals. Petitioner began operation of its chemical-reacting plant near Sedalia, Missouri in May of 1978. (Vol. I, Appendix to Petition 8). From that time forward, respondents, who were residents of the area around the plant, were subjected, on a continual basis, to a series of explosions, toxic chemical spills, fires, odors, clouds of toxic chemical gasses, vapors, foam, and mists. (Vol. I, Appendix 8-43).

Respondents first complained to petitioner, but to no avail. Respondents then sought the aid of their local and state representatives, likewise without results. The EPA and its Missouri counterpart, the DNR, were also consulted without effect.

In December of 1981 these suits were filed, seeking actual and punitive damages for negligence and conscious disregard for the safety of respondents. Petitioner counterclaimed for abuse of process and conspiracy, also seeking actual and punitive damages. (Vol. I, Appendix 3). Petitioner's Counterclaim was later dismissed.

Trial commenced on August 12, 1985 and continued for four and one-half months. One hundred and sixty-five witnesses testified, and the transcript of the trial consumes ten thousand pages. (Vol. I, Appendix 4).

The evidence at trial revealed that petitioner had continuously, knowingly, and intentionally mishandled highly dangerous, mutagenic and carcinogenic toxic chemicals, so as to cause serious and permanent damage to the health of respondents. (Vol. I, Appendix 52-56). The first 230 pages of the Missouri Court of Appeals' decision details respondents' evidence. (Vol. I, Appendix 3-230). The most damning evidence was summarized by the Missouri Court of Appeals as follows:

> "The evidence for punitive damages submissions was abundant:
>
> Alcolac was designed as a state of the art zero discharge plant. Odorous, toxic and hazardous vapors, liquids and sediments were waste products of the soap and monomer processes. It was the theory of the design that any such wastes would be contained within the plant for harmless disposal. Whatever the purpose of the design, Alcolac never operated as a self-contained, closed system. From the first, toxic and odorous wastes were emitted by Alcolac into the atmosphere over the environs in the form of haze, smoke, suds, vapors, acid mist and residues.
>
> There were many reasons.
>
> The intricate, state of the science environmental control system installed in the plant were meant to be operated by an environmental control engineer trained for that function. It was put in the charge rather, first in the hands of a person who was discharged for drunkenness, and then in the charge of a youth - a maintenance employee and high school dropout without any formal training or instruction.

It was not until July of 1980 that a trained engineer, Mark Blowers, was given that duty. [He remained for two years.] In the course of the two years between May of 1978, when the Alcolac operations commenced and July of 1980 when Blowers assumed charge of the environmental control building, the vital controls did not function properly as a closed system. The acid scrubbers in the soap building did not function much of the time, so that the vapors were not cleansed before emission into the atmosphere, but remained odorous and caustic. The liquid discharged into the bioponds from the soap factory remained full of suds and became a source of odors as well as a means of transport around the countryside of the toxic compounds from the monomer building with which they mixed. The carbon filter beds regularly shifted so that the wastes went through to emission without absorption of the toxic contaminants, contrary to the purpose of a closed system. The liquid incinerator, designed as the means of disposal of the waste stream of toxic particulates from the monomer process failed in function in December of 1978 - only seven months after commencement of production - but was continued to use, and belched toxic smoke and haze into the atmosphere.

Alcolac failed as a closed system also because the personnel were neither trained nor encouraged to contain the toxic pollutants within the plant for treatment and disposal. There was no safety program, nor training, nor operation manual to guide them. Toxic chemical spills were common, and were often pushed into the drains with squeegees, rather

than through the filtration beds before emission into the biopond. The toxic liquid wastes from the monomer process were also regularly routed directly into the biopond without prior decontamination. From there, they evaporated into the atmosphere, mixed with the suds to be borne around the area, or remained in the biopond to combine with other effluents from the monomer process to synergize into even more potent toxicity. The excess vapors and fumes of sulphur trioxide from the soap plant were merely released into the atmosphere by opening the factory doors. There was no plan to capture and treat the toxic vapors from the raw materials stored on the premises or transferred from transports into the plant. They were stored on the Alcolac grounds in thousands of drums, and not within a structure, so that the toxic fumes and liquids from the frequent leaks from corrosion or mishaps with transport trucks were not contained, but simply evaporated into the ambient air or seeped into the ground.

Alcolac failed as a closed system also because the production consistently exceeded design. The liquid toxic waste generated by production simply was beyond the capacity of the bioponds to biodegrade. Instead, a sludge of toxic sediment formed and engendered not only odors, but dangerous chemical mixtures and vapors.

These effects were not merely the results of careless lapses in machines, methods and management. They were consequences of deliberate business decisions taken by Alcolac. A jury could have understood from the evidence that the decisions to forgo an environmental control engineer, the rede-

sign of the bioponds to accommodate the increased organic load from the increased production, the correction of the acid scrubbers, the installation of hydrocarbon monitors, and other pollution control measures were prompted by the motives of Alcolac president Anderson to spare expense in order to enhance the profit on which his bonus depended.

There was other evidence from which a jury could find that Alcolac knew that these and other mispractices and deficiencies in the environmental control system were, unless corrected, a continued threat and danger to persons exposed to the chemical wastes which resulted, but that Alcolac, with complete, reckless - even arrogant - indifference, nevertheless allowed them to go uncorrected.

The complaints of the residents around Alcolac of injurious fumes, haze, vapors and odors from the plant began soon after the commencement of production in May of 1978. Those complaints never abated and came to the attention of the Missouri Department of Natural Resources. Odors from Alcolac premises were palpable, the liquid incinerator generated haze into the atmosphere, the bioponds gave off the scent of hydrogen sulfide and other chemicals, suds blew off the bioponds onto the properties in the environs, and caustic vapors and sediments irritated the skin, eyes and respiration of those on whom they impinged. Citations for excessive emissions issued against Alcolac, as did notice of violations. As a consequence, the efficacy and operation of the Alcolac environmental control system came under the scrutiny of DNR as early as September of 1978, only four months after the commencement

of production. It was then that, for the first time, was mentioned the installation of a recording hydrocarbon detector on the stacks to analyze the organic contact of the emissions. There were other elements of the environmental control system that DNR deemed needed further attention.

Alcolac called in WAPORA, its subsidiary - an environmental consultant with international reputation - to investigate and make suggestions. WAPORA reported in the summer of 1978 the problems for correction: No trained competent engineer responsible for the pollution control systems: lack of monitors at the vents to identify and measure any chemicals which might be escaping; the recurrent overload of the bioponds from excessive production as high as eighteen times beyond design capacity; the liquid incinerator malfunction so that toxins escaped into the atmosphere; training of employees and instruction in the Environmental Control Systems Operating Manual devised for the plant by WAPORA to correct the current haphazard handling of chemicals - and other problems. Anderson of Alcolac in the meanwhile asked Bregman of WAPORA to meet with an environmental committee of Sedalia citizens to allay their concerns. Bregman understood that the WAPORA recommendations would be implemented by Alcolac, and so assured the citizens that the air pollution problems would be resolved. The recommendations were rejected, however, by president Anderson as too costly. Anderson then dismissed WAPORA altogether from the Sedalia project in December of 1979, the problems went uncorrected, and the pollution continued. Thus, Anderson not only gave no heed to WAPORA, an affiliate

Alcolac management considered its 'in-house consulting group,' but also discontinued its services. Anderson did call upon Bregman once again after the commencement of these suits, but to ask that he destroy the WAPORA file on the Sedalia project. Bregman refused.

The pollution from Alcolac did not abate, nor did the effects, and the complaints continued. The environmental engineer WAPORA deemed so essential to the management of the pollution control system was finally employed in mid-1980 and remained for two years. But the employee mispractices and equipment failure continued, and so did the toxic pollution. The liquid incinerator still malfunctioned, the bioponds still gave off odors and suds, the employees still opened the doors to vent spills and excess vapors into the atmosphere rather than to dispose of them within the closed system, and they still routed the monomer wastes around the filtration environmental controls directly into the bioponds where they evaporated or were carried away in the suds. The bioponds were never monitored for toxicity, nor were the vapors or fumes at the points of emission. The liquid incinerator malfunctioned since December of 1978 - only seven months after commencement of production - and continued into year 1981. It was the function of that system to destroy the toxic organic contaminants from the monomer process so that a harmless vapor remained for emission through the stack. The malfunction of the incinerator meant that any matter injected for disposal would only partially burn, or not at all, so that the toxins emitted without change or, if partially changed, into

countless toxic components. The malfunction was so complete that Alcolac vice-president Bouroff officially commented to Alcolac president Anderson:

> Our liquid incinerator has the poorest performance ever seen. Most of the time it is out of commission due to all kinds of mechanical problems. It is an absolute waste of time and money. We consider it a 100% failure and the most costly operation. *Also, part of our environmental problems were/are caused by this piece of equipment.* [Emphasis added].

That memorandum was dated May of 1980. Notwithstanding the environmental dangers a malfunctioned incinerator entailed, the use continued for more than a year. In fact, the liquid incinerator had been 'out' since December of 1978, as an earlier memorandum from Bouroff to Anderson advised. Thus, for almost three years, instead of harmless vapors, the liquid incinerator emitted into the atmosphere and exposed persons in the environs to a multifarious assortment of toxins and carcinogens. A jury could find from that and other evidence that Alcolac was not only negligent, but acted with complete and reckless indifference to the rights of those around them.

To finally resolve the problem of odor emissions, Alcolac entered into an abatement agreement with the Missouri Department of Natural Resources and undertook nine actions. Among them were the agreement to install a hydrocarbon monitor to sample the emissions from each stack of the vapor incinerator and carbon absorption system in the monomer building, and to implement a system to determine on a

one-time basis the nature and concentration of the emissions from the stacks of the vapor incinerator and carbon absorption system *for each product manufactured in the monomer building.* Alcolac also agreed to develop a plan for the training of employees as to the control of odorous emissions from sources at the facility. The abatement agreement was entered on May 30, 1980. The hydrocarbon monitor with alarm was to be installed by January of 1981. It was not fully installed until May of 1984 - more than three years later, and more than six years after the first recommendation for such a pollution control by DNR to Alcolac. The system to determine on a one-time, product-by-product basis the nature and concentration and nature of the emissions from the stacks was *never* installed. Thus, there was no way to identify or measure with any definiteness the kind of concentration of any chemical emission from the monomer process. Alcolac did ultimately, as required by the abatement agreement, develop an approved plan for the training of employees as to the control of odorous emissions at the facility. The odorous emissions continued nevertheless, as did the intrusions of foam, the spills at the plant, and the official notices to Alcolac of excessive emissions. These continued almost to the date of trial in 1985.

This evidence, once again, suffices to prove conduct by Alcolac, not merely negligent, but reckless and utterly indifferent to the rights of the plaintiffs." (Vol. I, Appendix 362-368).

Contrary to petitioner's statement of facts, there was *no* evidence in the record regarding petitioner's net worth. (Vol. I, Appendix 354-356). As stated by Presiding Judge

Shangler in the opinion below, "[t]here is simply no discernible basis either in the evidence or in the record on appeal for the fact of a $15,300,000.00 net worth . . ." (Vol. I, Appendix 356).

In December of 1985, the jury returned actual damage verdicts for $200,000 and punitive damage verdicts in the amount of $1,387,096.07 for each of the respondents. The trial court ordered a new trial on the issues of damages alone, and cross-appeals followed. Nearly three years after trial, the Missouri Court of Appeals affirmed the trial court's ruling and remanded the cases for re-trial on the issue of damages, both actual and punitive.

While this case has been on appeal, several of the plaintiffs have died, one from the cancer caused by Alcolac, and another, dispairing, took his own life.

ARGUMENT

I. The Petition Contains a Jurisdictional Defect in That the Missouri Court of Appeals' Decision Is Not a Final Judgment or Decree Within the Meaning of Title 28 U.S.C. Section 1257.

Since 1789, Congress has granted this Court jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a "final judgment or decree". *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and 28 U.S.C. Section 1257. While this court has not administered this rule in a mechanical fashion, it has consistently declined cases in which the additional proceedings would require the decision of other federal questions that might also require

review by the court at a later date. *Cox*, supra at page 477. Here, the Missouri Court of Appeals remanded these cases for a new trial on the issue of the amount of actual and punitive damages. (Appendix Vol. I, 369). The retrial of the issue of the amount of punitive damages "might also require review by the court at a later date". See the concurring opinions of Justices Brennan, Marshall and O'Conner in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, decided June 26, 1989. Consequently, as to Supreme Court jurisdiction, the cases at bar are the same as eminent domain cases where the taking issue has been decided by the state court, but the amount of compensation remains to be decided. In such cases the state judgment is not final and is not reviewable. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981). Under the circumstances of the cases at bar, the Missouri Court of Appeals' decision is not "final" because it does not cover both aspects of an integral problem. What is more, the fate of this whole litigation may well be affected by the fate of the unresolved issue of damages. Favorable awards on retrial of the damage issues might well satisfy petitioner to acquiesce in the disposition of the liability issues. This court "ought not pass on Constitutional issues before they have reached a definite stop." *Republic Gas Co. v. Oklahoma*, 334 U.S. 62, 71 (1948).

II. This Case Is Not a Proper Case for Review Because the Retrial Ordered by the Missouri Court of Appeals Will Be Governed by Different Procedures.

These cases were originally tried during 1985. During the 3 years the cases were on appeal, the Missouri legislature enacted Section 510.263 Revised Statutes of Missouri 1987 which sets forth new procedures for the

trial of punitive damage cases in Missouri. This new legislation calls for a bifurcated trial, post-trial motions for credit for punitive damages previously paid, and applies the doctrine of remittitur and additur to punitive damage awards.

The Missouri Court of Appeals, in its opinion, indicated that these new procedures may be followed upon the retrial. (Vol. I, Appendix 370-371).

Rule 17 provides that certiorari will be granted "only where there are special and important reasons." In light of the fact that these cases will be retried under different procedures, a decision in this case would be of no precedential value and would be, in the context of Supreme Court matters, unimportant.

III. The Procedures for Imposition of Liability for Punitive Damages in Missouri Do Not Violate Due Process.

Respondents read and understand the concerns expressed by Justice O'Conner in *Banker's Life* regarding the constitutionality of punitive damage procedures to apply to the jury's freedom to assess *any amount* of punitive damages:

> "Mississippi law gives juries discretion to award any *amount* of punitive damages . . ."
>
> "Punitive damages are not measured against actual injury, so there is no objective standard that limits their *amount* . . ."
>
> ". . . Although this standard may describe the required mental state with sufficient precision, *the amount of the penalty that may ensue is left completely indeterminate*"

> ". . . the Mississippi Supreme Court said, 'the determination of the *amount* of punitive damages is a matter committed solely to the authority and discretion of the jury'. This grant of wholly standardless discretion *to determine the severity of punishment* appears inconsistent with due process." Justice O'Conner's concurrence in *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. ....., 100 L.Ed.2d 62, 78-79, 108 S.Ct. ..... (1988). (Emphasis supplied).

In the cases at bar, there presently is no determination of the *amount* of punitive damages. Under the Missouri Court of Appeals' decision, a new jury is to determine the amount of punitive damages, under new procedures. This honorable Court should not pre-judge a future proceeding, but if the Court were to examine Missouri's punitive damage procedures, it is clear that Missouri's procedures vary greatly from the Mississippi procedures described in *Banker's Life*.

In Missouri, punitive damage prayers are to be stated separately. "In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered." (Rule 55.19 Missouri Rules of Civil Procedure). In Missouri, a jury's verdict is deemed excessive if it exceeds the amount claimed in a party's petition. *Larabee v. City of Kansas City*, 697 S.W.2d 177, 181 (Mo. App. W.D. 1985).

Under Missouri law, the punitive damage award must not be disproportionate to the award of actual damages. *Stephens v. Lever Brothers Co.*, 155 S.W.2d 540, 543 (Mo. App. W.D. 1941); and *Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo. App. E.D. 1974). Further, an award of punitive damages must bear some relation

to the injury inflicted and the cause thereof. *Johnson v. American Mutual Liability Ins. Co.*, 335 F. Supp. 390 (Mo. W.D. 1971); *Ross v. Holton*, 640 S.W.2d 166 (Mo. App. E.D. 1982).

In Missouri, juries do *not* have "carte blanche in awarding punitive damages. Attendant circumstances, including mitigating as well as aggravating circumstances, must be taken into consideration, and the amount must be equated to the degree of malice, criminality, or contumely characterizing the actor's conduct for which punishment or determent is deemed necessary". *Pisha v. Sears Roebuck & Company*, 496 S.W.2d 280, 284 (Mo. App. W.D. 1973).

In Missouri, the defendant's net worth may be considered by the jury and the reviewing courts, if it is in evidence. *Mullen v. Dayringer*, 705 S.W.2d 531, 536 (Mo. App. W.D. 1985). In the case at bar, petitioner's net worth was *not* placed in evidence. (Vol. I, Appendix 355-356).

Missouri allows for a bifurcated trial in punitive damage cases upon the request of a party. (Section 510.263 R.S. Mo. Supp. 1987 and Rule 66.02 of the Missouri Rules of Civil Procedure). A Rule 66.02 request for bifurcation was not made during the first trial of this case.

Missouri punitive damage awards are subject to close scrutiny by the trial court, the Missouri Court of Appeals and the Missouri Supreme Court and are currently subject to remittitur if deemed excessive. (Section 510.263 R.S. Mo. Supp. 1987). In Missouri, a trial court may set aside a punitive damage verdict as against the weight of the evidence - an option of discretionary action the trial court here explicitly declined. (Rule 78.02 Missouri

Rules of Civil Procedure, Vol. I, Appendix 353-354). In addition, prior punitive damages paid by the defendant are to be credited to the defendant. (Section 510.263 R.S. Mo. Supp. 1987).

It is true that Missouri law allows a jury to return a punitive damage verdict on a civil burden of proof instruction. However, it is readily apparent from prior decisions of this court that due process in civil, "money" cases is satisfied by a civil burden of proof. See *Standard Oil Co. v. Missouri,* 224 U.S. 270 (1911) at 287:

> "The 14th Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done, the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law . . . . The matter was summed up by Justice Moody in Twining v. New Jersey, 211 U.S. 110, [111], where, citing many authorities, he said:
>
> > 'Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, . . . and that there shall be notice and opportunity for hearing given the parties . . . . Subject to these two fundamental conditions, . . . this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law.' "

In *Herman v. MacLean T. Huddleston,* 459 U.S. 375, 74 L.Ed.2d 548, 103 S.Ct. 683 (1983) the court noted that

"even severe civil sanctions" are "permitted after proof by a preponderance of the evidence".

United States v. Regan, 232 U.S. 37, 48-49, 58 L.Ed. 494, 34 S.Ct. 213 (1914) held that proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution.

Respondents respectfully suggest that the cited cases were correctly decided and that due process is satisfied by the preponderance of the evidence standard.

IV. The Missouri Court of Appeals Did Not Change Common Law Standards in Deciding These Cases.

Petitioner, in a naked attempt to try and fit the cases at bar into the mold of *Banker's Life,* claims that the Missouri Court of Appeals "radically changed common law standards of causation, submissibility and burden of proof."

There simply was no such change.

As to causation, the Missouri Court of Appeals followed the "substantial factor" principle as is set out in the Restatement (Second) of Torts, Section 431, comment a (1965). Missouri has long adhered to the substantial factor principle. *Giles v. Moundridge Milling Co.,* 351 Mo. 568, 173 S.W.2d 745, 750 (1943); *Chism v. White Oak Feed Company Inc.,* 612 S.W.2d 873, 881 (Mo. App. 1981). There simply was no change whatsoever in standards of causation in these cases. In fact, the truth is that petitioner's own experts testified that Alcolac had caused certain of respondents' injuries. (Vol. I, Appendix 258).

Likewise, there was no change announced in the burden of proof. The decision of the Missouri Court of Appeals stated that the burden of proof in the cases at bar was the same as in other cases:

> "A toxic tort plaintiff, as any other, bears the burden to prove the facts essential to a prima facie case . . . the plaintiff . . . must show by a preponderance, or greater weight, of the evidence that the injury was the result of the negligence of the defendant. *Ledkins v. Missouri-Kansas-Texas Railroad Company*, 316 S.W.2d 564, 568 [5] (Mo. 1958); *Rexford v. Philippi*, 337 Mo. 389, 84 S.W.2d 628, 632 [5] (1935)." (Vol. I, Appendix 251-252).

There was no change in the burden of proof in these cases.

Likewise, "submissibility of the cases at bar was judged according to long-standing Missouri negligence law: "The evidence of causation - as well as of breach of duty and biological damage - was sufficient to prove prima facie the negligence causes of action against Alcolac. (Vol. I, Appendix 281-282). The "submissibility" of the punitive damage claims was also analyzed against traditional, long-standing rules:

> "C
>
> Submissibility of Punitive Damages
>
> The trial court order does not posit, nor does Alcolac argue, that the plaintiffs failed to show as to the defendant that 'complete indifference to or conscious disregard for the safety of others' M.A.I. 10.02 requires a jury to believe as the premise for a punitive damage award. In that context, *complete*

indifference or conscious disregard, our supreme court en banc holds in *Hoover's Dairy, Inc. v. Mid-America Dairymen*, 700 S.W.2d 426 (Mo. banc 1985), means [at 436 [17, 18]

> the defendant knew or had reason to know that there was a *high degree of probability* that the action would *result in injury*.

We deem that the evidence proved the negligent conduct submitted: that Alcolac loaded the bioponds beyond their design capacity, allowed unfiltered toxic waste to discharge directly into the bioponds, operated the liquid incinerator in such a manner as to discharge toxic chemicals into the atmosphere, and that at the time Alcolac acted [or failed to act] Alcolac knew or had reason to know that there was a high degree of probability that its conduct would result in injury. We deem, therefore, that the issue of liability for punitive damages was submissible on the evidence before the jury and, as our opinion determines, was concluded by the verdicts." (Vol. I, Appendix 359-360).

Clearly there were no retroactive change involved in the Missouri Court of Appeals' decision.

CONCLUSION

This case is clearly not ripe for Supreme Court review. No jury determination of the amount of punitive damages has been made. No instruction has yet been given to a jury for determining the amount of punitive damages. Clearly, these cases are not final, and, what is more important, the retrial of the amount of punitive damages may raise additional constitutional issues.

The Petition for Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

COMES NOW Betty Elam, et al., respondent, pursuant to Supreme Court Rule 22 and adopts and incorporates by reference the Appendix in Volumes I and II propounded by the petitioner. Respondent additionally submits the following Supplemental Appendix.

(Filed November 28, 1988)

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No: WD 38105

BETTY ELAM, et al.,
Respondents-appellants,

vs.

ALCOLAC, INC.
Appellant-respondent.

SUGGESTIONS IN OPPOSITION TO APPELLANT-RESPONDENT ALCOLAC, INC.'s APPLICATION TO TRANSFER TO SUPREME COURT

COME NOW Respondents-appellants herein, and for their suggestions in opposition to Alcolac's Application to Transfer to the Supreme Court of Missouri, respectfully state:

1. Alcolac contends that the use of M.A.I. 10.02 is unconstitutional. Alcolac recites as grounds for its argument a long list of complaints regarding the imposition of punitive damages. But, despite exhaustive research, Alcolac cannot cite a single case that holds as Alcolac argues. In fact, authority that is cited by Alcolac supports the position that punitive damages are lawful and constitutional.

(a) Alcolac argues that it is a violation of due process to submit to a civil jury the punitive damages instruction under a preponderance of the evidence burden of proof. This contention is without merit. Punitive

damages are civil in nature and are therefore not required by the U.S. Constitution to be subject to proof beyond a reasonable doubt. *Jordan v. Clayton Brokerage Company of St. Louis, Inc.*, No. 87-1312, slip op. at 12 (8th Cir. Oct. 17, 1988). See also *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan J. Concurring.).

(b) The Court's opinion noted that Alcolac could cite no decision of Missouri Courts or of the United States Supreme Court which pronounced awards of punitive damages as unconstitutional or as being unfair, (p.359, Court's opinion). The chief "authority" for Alcolac's contention of unconstitutionality is *Bankers Life & Casualty Co. v. Crenshaw*, ... U.S. ....., 108 S. Ct. 1645, 100 L.Ed.2d 62 (1988). However, the issues raised by Alcolac were not even reached in *Banker's Life*.

(c) Punitive damage awards have never been held to be unconstitutional as violative of due process, equal protection, or as excessive fines. Such damages have been a part of the law and precedents in the United States for some 200 years. The Missouri Supreme Court has specifically approved the award of punitive damages under the civil burden of proof not only by way of case law but also by the promulgation of Missouri Approved Jury Instructions 10.01-10.06. Furthermore, as the Court's opinion indicated, the Missouri legislature has most recently enacted Sec. 510.263, R.S.Mo. Supp. 1987 which "assumes the continued efficacy of punitive damages as a redress for aggravated tortious conduct", (p.359 Court's opinion). There is no foundation or authority for the constitutional assertions made by Alcolac.

(d)(e) Alcolac further argues that the Court's opinion represents a radical change in the principles of causation and submission of claims. However, no such radical

changes are enunciated in that the substantial factor test has long since been the law, *Giles, Ricketts, Chism,* and there was no shift in the burden of proof to Alcolac, (p. 270 Court's opinion). Furthermore, the substantial factor test as stated in the Restatement of Torts 2d and has been adopted in Missouri. To suggest that the Court's opinion represents a radical change in the current status of Missouri law, as Alcolac does, is incorrect.

2(a). While the plaintiffs concede that this case is of general interest they would hasten to point out that the resolution of this case and the public's perception of the legal system's ability to deliver justice in a timely fashion is of much greater importance and interest to the public. This case began nearly a decade ago. During that decade, the plaintiffs and their neighbors have been subjected to continuous spills, explosions and venting of toxic chemicals. This conduct has continued for ten years and no government agency has been able to control or stop Alcolac. As the Court's opinion notes, Alcolac has violated orders from the EPA and the DNR, has failed to comply with requests of the local fire department, and has even rejected the mandates of its own safety engineers. The jury, the trial court, and the Appellate Court have found that Alcolac's conduct showed complete indifference to or conscious disregard for the safety of its neighbors. Nevertheless, as of this date, Alcolac has not paid one cent to any of its victims. In fact, it has continued to expand the chemical plant and cause further damage to the environment and the individual citizens of Missouri.

Alcolac's strategy is one of delay, delay, delay. Unfortunately, the plaintiffs do not have as much time as a perpetual corporation. During the pendency of the appeal,

which has taken three years, two of Alcolac's victims have died. This is a case where justice delayed is justice denied.

A policy statement can be made by denying transfer of this case and approving what the trial court and the opinion has established. Alcolac is liable for the substantial harm it has caused to its neighbors. As Alcolac points out, there will be several important messages sent by this Court's opinion. It will tell the world that Missouri will not allow corporations to spread deadly toxic chemicals throughout the countryside of Missouri and then expect the court system to delay indefinitely the payment for the harm created.

2(b). Contrary to Alcolac's assertions, the Court followed established Missouri law to rule the issues raised in this section. The Court did not shift the burden of proof or bring about any other "radical" changes in Missouri law. The plaintiffs' direct the Court to their suggestions in opposition to Alcolac's motion for rehearing filed on November 23, 1988 herein.

2(c). Alcolac infers that punitive damages are unconstitutional and cite in support the dissents from *Hoover's Dairy* and *Bankers Life*. However, as noted above, punitive damages have been a part of the American legal system for some two centuries and the Missouri Legislature recently affirmed support for awarding punitive damages by passage of Sec. 510.263, R.S.Mo. Punitive damages are not unconstitutional and there are no cases, Federal or Missouri, that declare them to be unconstitutional.

3. Alcolac argues that *Hoover's Dairy* and the Court's opinion here would support punitive damages

on a negligence standard alone. Such is simply not the case, (p.359-360 Court's opinion). This court held:

> "This evidence, once again, suffices to prove conduct by Alcolac, not merely negligent, but *reckless and utterly indifferent to the rights of the plaintiffs.* The submissions for punitive damages were proper. (p.368)

This opinion mandates something more is needed to submit punitive damages to the jury than the mere negligence standard, and that something more was found in abundance in these cases.

Lantz Welch, P.C.
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I hereby certify that a copy of the foregoing was mailed, postage prepaid this 28th day of November, 1988 to:

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(Filed January 23, 1989)

IN THE SUPREME COURT OF MISSOURI

No. 71296
Consolidated

BETTY L. ELAM, CLARENCE ELAM and LINDA LOU SANDERS, ETHEL M. BERRY, CARL C. and JACQUELINE BERRY, VIRGIL and DOROTHY BRADLEY, EDWARD and MALVA GEHLKEN, DAINIE and MARY LUCETTA LANDON, GWENDOLYN AND JOHN C. LAWRENCE, GLEN A. and BERNICE MILLER, CHARLOTTE A. and JOHN PHILLIPS, DANIEL CHARLES AND JOYCE PRYOR and AMBER CROSS, ARNOLD L., JOY R., JOYCE and TAMMY SOMMERS, JAMES R., KAY D., WILLIAM LANCE, LISA and LYLE TURLEY, GENEVIEVE AND RALPH H. WITHERS,
Respondents-appellants,

vs.

ALCOLAC, INC.
Appellant-respondent.

RESPONDENTS-APPELLANTS' SUGGESTIONS IN OPPOSITION TO APPLICATION TO TRANSFER TO SUPREME COURT

These are the cases of thirty-one victims of toxic chemical poisoning. The cases were consolidated and tried to a jury for four and one-half months. The jury heard one hundred and sixty-five witnesses and saw some seven hundred and fifty exhibits. The transcript of the trial consumes fifty-three volumes and more than ten thousand pages. Cross-appeals resulted from the trial

court's order granting a new trial on the issue of damages only. Despite the overwhelming enormity of the task, Judge Shangler's opinion, spanning some four hundred and twenty-two pages and nearly one and one-half years in the writing, displays a total mastery of the facts and law applicable to these cases. Alcolac's claim that these cases were incorrectly decided is clearly and demonstratively wrong. For the sake of clarity, plaintiffs will respond to Alcolac's claims in the order that Alcolac presents them:

(a) *Constitutional Issues*:

Alcolac contends that the use of M.A.I. 10.02 is unconstitutional. Alcolac recites as grounds for its argument a long list of complaints regarding the imposition of punitive damages. But, despite exhaustive research, Alcolac cannot give a single case that holds as Alcolac argues. No court in the United States has ruled that punitive damages are unconstitutional. In fact, the authority cited by Alcolac supports the position that punitive damages are lawful and constitutional.

(i) Alcolac argues that it is a violation of due process to submit to a civil jury the punitive damages instruction under a preponderance of the evidence burden of proof. This contention is without merit. Punitive damages are civil in nature and are therefore not required by the United States Constitution to be subject to proof beyond a reasonable doubt. *Jordan v. Clayton Brokerage Company of St. Louis, Inc.*, No. 87-1312, Slip op. at 12 (8th Cir. Oct. 17, 1988). See also *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan J. Concurring).

(ii) The Court's opinion noted that Alcolac could cite no decision of Missouri Courts or of the United

States Supreme Court which pronounced awards of punitive damages as unconstitutional or as being unfair, (p.359, Court's opinion). The chief "authority" for Alcolac's contention of unconstitutionality is *Bankers Life & Casualty Co. v. Crenshaw,* ..... U.S. ....., 108 S. Ct. 1645, 100 L.Ed. 2d. 62 (1988). However, the issues raised by Alcolac were not even reached in *Banker's Life.*

(iii) Alcolac argues that this honorable court should accept this case because the U.S. Supreme Court has agreed to hear *Browning-Ferris Inds. v. Kelco Disposal, Inc.,* No. 88-556, cert granted December 5, 1988. Plaintiffs submit that, if the United States Supreme Court makes any rulings pertinent to the punitive damage issue in these cases, those rulings will be available to the parties and the trial court on the retrial of these cases.

(iv-v) Alcolac argues that its constitutional rights have been violated by the Court of Appeals' application of a "radical change in standards of causation". There was no such "radical change". See Judge Shangler's opinion, pages 249-281. The substantial factor principle has long been the law. *Giles v. Moundridge Milling Co.,* 173 S.W.2d at 750; *Chism v. White Oak Feed Company Inc.,* 612 S.W.2d 873, 881 (Mo. App. 1981). What is more, Alcolac's own experts testified at trial that Alcolac's chemicals had caused certain of plaintiffs' injuries. (Opinion p.270).

(b) *Contrary to previous appellate decisions:*

(i) Alcolac contends that the issues involving liability and the issues involving damages cannot be separated for retrial.

The facts and the law in these cases require that there be no new trial on the issue of liability. Section 512.160

(3) R.S.Mo. mandates that "no new trial shall be ordered as to issues in which no error appears". The opinion clearly holds that the mentioning of "chemically induced AIDS" or the "increased risk of cancer" had no material effect on the issue of liability. Instead, the opinion rules that these remarks were prejudicial only on the issue of damages (p.336) (p.328), and "that the liability of Alcolac to the plaintiffs was proven by substantial evidence *and adjudicated without significant error*". (p.368) The evidence on the issue of liability was clear, convincing, and overwhelming. The quality of the proof rose to the level where the Court ruled that the issue of punitive damages was properly submitted. In sum, the "inflammatory" remarks were ruled not to be prejudicial on the issue of liability. This ruling is factually and legally correct.

(ii) Alcolac contends that Judge Shangler's opinion conflicts with *Panjwaui v. Star Service & Petroleum Company*, 395 S. W. 2d 129 (Mo. 1985). It suffices to say that the *Panjwaui* case qualifies its holding with the disclaimer: ". . . this is not to anticipate or to attempt to set forth a hard and fast rule for all future cases." (l.c. 133) Clearly and specifically, *Panjwaui* was decided upon its particular record. (l.c. 133) Judge Shangler's opinion on the 10,000 page record in these cases does not conflict with the totally "limited to this case" holding of *Panjwaui*.

(iii) Alcolac claims that Judge Shangler's opinion conflicts with *Schoor v. Wilson*, 731 S. W. 2d 308 (Mo. App. 1987). *Schoor*, however, is easily distinguishable. In that case, the jury was given an erroneous instruction that went to the issue of liability. These cases, on the other hand, were properly submitted and the only error went to the amount of damages.

(2) Alcolac claims that Judge Shangler's opinion is contrary to the holding in *Zafft v. Lilly*, 676 S. W. 2d 241 (Mo. banc. 1984). In order to make this claim it is first necessary for Alcolac to twist and misconstrue Judge Shangler's opinion.

The opinion does not "shift the burden of proof" and it does not "acknowledge a complete lack of specific proof". Instead, the opinion details the overwhelming proof that was made by the plaintiffs in spite of defendant's intentional and unlawful destruction of the evidence it so ardently seeks to require. Such proof included admissions by defendant's experts, admissions by its employees and its president, internal documents and overwhelming circumstantial evidence.

Judge Shangler distinguishes *Zafft* at pages 268-270 of the opinion. Clearly there is no conflict between *Zafft* and the opinion in these cases.

(c) *Important questions; widespread general interest:*

As previously noted above, there were no "radical new standards of causation and of submissibility" announced in these cases, nor was there a "total revision of all previously held concepts of the rules of evidence". Alcolac's hyperbole is symptomatic of the weakness of its argument. Trial Courts have always been allowed the discretion to limit cross-examination on collateral matters. *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 877 (Mo. App. 1985).

Plaintiffs acknowledge that there is interest in these cases, but would hasten to add that these appeals were rightly decided after one and one-half years of deliberation, study, and writing. There is public interest in seeing to it that the legal system works in a timely

fashion for "justice delayed is justice denied". The defendant in these cases has recklessly, knowingly and intentionally operated its toxic chemical plant without safety equipment, knowingly vented toxic fumes into the atmosphere, intentionally routed deadly toxic chemicals around filtration systems and directly into open ponds and streams. Ironically, because of the magnitude of the defendant's wrongs and the number of people that defendant has injured, the legal system is being tested as to whether justice can be obtained against the giant chemical companies. A transfer of these cases to the Supreme Court could only cause further delay and additional hardship for the victims, and frustrate justice. Alcolac's motion for transfer should be denied.

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I hereby certify that a copy of the foregoing was mailed, postage pre-paid this 20 day of January, 1989, to:

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